IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13-08-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MRS. JUSTICE R. BANUMATHI

O.S.A.NO.282 OF 2003

K. Kannappan .. Appellant

Vs.

1. C.S. Selvaraj (deceased)

2. C.R. Vasanthan
S/o late C.S. Rajabushnam
R2 impleaded as party respondent
vide order dt.26.4.07 made in
C.M.P.No.1363/2007

3. Mrs.C.B. Sarojini
W/o. Late Bavanandan

4. C.B. Janakiraman
S/o. late Bavanandan

5. C.B. Rajendaran
S/o. late Bavanandan

6. Kanchana
W/o.C.S. Rajan

7. Mrs. Vasantha Babu,
W/o. late C.S. Babu

8. Kalavathi,
W/o.K. Mani

9. C.B. Prakash,
S/o. Babu

Respondents 3 to 9 impleaded as
party respondents vide order
dt.21.6.07 in CMP.1770/07

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10. Mrs.R. Kasthuri,
W/o. late Rajabushanam

11. Mrs.C.R. Uma,
D/o. late Rajabushnam

12. Mrs.C.R. Mala
D/o. late Rajabushnam .. Respondents

Appeal filed under Clause 36 Rule 1 of Original Side Rules against the Order dated 15.7.2007 made in Review Application 1534/2002 in A.No.5348/2002 in C.S.No.243/1980 on the file of the High Court, Madras.

For Appellants : Mr.S. Parthasarathy
Senior Counsel for
Mr.P.K. Valliappan

For Respondents : Mr.T.V. Ramanujan
Senior Counsel for
Mr.M.A. Srinivasan

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J U D G M E N T

P.K. MISRA, J

Checkered history of the litigation is required to be noticed as briefly as possible. The present appellant and his father had filed C.S.No.243 of 1980 in the Original Side of the High Court of Madras for specific performance of the contract for sale dated 13.12.1978. Learned single Judge of this Court by judgment dated 20.9.1982, decreed the said suit. The defendants, however, filed O.S.A.No.213 of 1982. The Division Bench by judgment dated 28.11.1990, allowed the appeal and remanded the matter to the learned single Judge for re-hearing. Thereafter, by judgment dated 18.1.1994, the suit was again decreed with costs and since the amount required to be paid was already in court deposit, learned single Judge directed the defendants to execute the sale deed within a period of two weeks. The defendants again filed O.S.A.No.89 of 1994. The Division Bench by judgment dated 23.11.2001, while confirming the findings of the learned single Judge and dismissing the O.S.A., observed as follows :-

> "30. We are, therefore, of the considered opinion that the findings of the learned single Judge is well merited and it does not warrant any interference by this Court. We, therefore, confirm the judgment and decree of the learned single Judge. But, however, taking note of the fact that the agreement was made in the year 1978 and the property is situated within the city limits of Chennai and it is a common knowledge that the prices of the property have been increased due to several

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factors, we feel that a further sum of Rs.1,00,000/- only apart from the amount agreed under the sale agreement shall be paid by the respondents/plaintiffs to the appellants/defendants. The respondents/plaintiffs are directed to deposit the said amount before the trial court within a period of eight weeks from the date of receipt of this order and on such deposit the appellants shall execute the sale deed, failing which, it is open to the respondents/plaintiffs to initiate further proceedings in accordance with law.

31. In the result, the OSA is dismissed."

The defendants filed S.L.P.No.3120 of 2002 in the Honourable Supreme Court of India. Such Special Leave Petition was dismissed by order dated 22.2.2002. Undaunted by such order, the defendants filed Review Petition (Civil) No.388 of 2002, which was dismissed by order dated 10.4.2002.

2. After the above chapter was closed, a new chapter was opened. The plaintiff/appellant, who was required by the High Court to deposit a further sum of Rs.1,00,000/- in the judgment dated 23.11.2001 within a period of 8 weeks from the date of receipt of a copy of the order, made such deposit on 11.2.2002 by obtaining a certificate from the Registrar in terms of Order 31 Rule 2 and 3 of Original Side Rules and was thereafter pursuing the matter in execution proceedings in E.P.No.51 of 2002. At that stage, fourth defendant filed Application No.5348 of 2002 under Section 28 of the Specific Relief Act to rescind the contract as the plaintiff/appellant had not paid the money within the period stipulated by the judgment dated 23.11.2001 in O.S.A.No.89 of 1994. In the affidavit filed in support of such application, it was stated that the plaintiff had been directed to deposit a sum of Rs.1,00,000/- before the trial court within 8 weeks from the date of receipt of the order. It was stated :

"9. ... that the Carbon copy of the Judgment and Decree passed by the Division Bench of this Hon'ble High Court was made ready on 27.11.2001 and the same was delivered on 28.11.2001. Therefore the period of eight weeks granted to the Respondent/Plaintiff to deposit the said additional sum of Rs.1,00,000/- before the trial court apart from the sum payable under the sale agreement clearly expired on 22.01.2002 and the Respondent/Plaintiff had clearly and convincingly not complied with the conditional order of the Hon'ble Division Bench of this Hon'ble High Court within the time stipulated and the same has allegedly been deposited only on 11.2.2002 after a delay of nearly 19 days and no intimation or information or notice has been served on us about the said deposit by the Respondent/Plaintiff till date."

It was further stated that the plaintiff having not filed any petition for depositing additional sum of Rs.1,00,000/-, had lost his right and the decree had become inexecutable and the contract was liable to be rescinded in view of Section 28 of the Specific Relief Act.

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3. At that stage, the present appellant filed a counter affidavit, wherein it was indicated that the defendants had filed O.S.A.No.89 of 1994 and had sought for stay of execution of the decree i.e., execution of the sale deed and also dispossession from the disputed property. Even though the Division Bench declined to stay the execution of the sale deed, there was stay of dispossession with a direction that the judgment debtors to pay a sum of Rs.2,000/- per month for use and occupation of the property during pendency of the appeal by order dated 4.4.1994 in C.M.P.No.4824 of 1994. Subsequently, the sale deed was executed by the Assistant Registrar, Original Side, High Court, Madras as the defendants had not executed the sale deed. It was therefore indicated that applicant had violated the order of the Bench by not remitting the amount and had been collecting more than Rs.10,000/- from the tenants in occupation of the house. Regarding the specific averment relating to steno copy application, there was no specific averment made by the present appellant. However, it was stated that the defendants had applied for certified copy of the judgment in Copy Application No.9888 of 2002 on 26.11.2001 and stamps were called for on 18.2.2002 and copy of the order was made available on 19.2.2002. However, before the said date an additional sum of Rs.1,00,000/- had been deposited on 11.2.2002 and as such there was substantial compliance of the order passed by the Division Bench on 23.11.2001.

4. A reply affidavit was filed by the applicant/4th defendant Selvaraj. In such reply, it was specifically indicated that when the appeal was reserved for judgment, the plaintiff had applied for steno copy vide Copy Application No.44701 of 2001. It was further stated that such copy was delivered to the defendants on 28.11.2001. "Therefore naturally the respondent/plaintiff must/should also have received the said C.A.SR.No.44701/01 on the very same day and therefore the period of limitation of depositing the additional purchase money of Rs.1,00,000/- starts to run on and from 27.11.2001 and therefore the period of 8 weeks granted to the respondent/plaintiff to deposit the said additional sum of Rs.1,00,000/- before the trial court clearly expired on 22.01.2002 and the respondent/plaintiff had clearly, convincingly without an iota of doubt not complied with the conditional order of the Hon'ble Division Bench of this Hon'ble Court within the time stipulated and the same has allegedly been deposited only on 11.2.2002 after a delay of nearly 19 days and no intimation or information or notice has been served on me about the said deposit by the respondent/plaintiff even till date."

5. At that stage, a further affidavit was filed by the present appellant, wherein it was stated :-

> "2. ... I state that from the reply affidavit filed by the 4th defendant I am given to understand that the steno copy application No.44701/2001 has been filed on behalf of the respondent by my advocate's erstwhile clerk. However the said steno copy of the order was not furnished to us. On 26.1.2001

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(sic.26.11.2001) my counsel had applied for certified copy of the judgment and decree in C.A.No.9888/2001 and stamps were called for on 18.2.2002 and it was made ready on 19.2.2002. since the steno copy was not made available to my counsel and so also the certified copy of the order and decree dated 23.11.2001, my counsel gave a letter to the Additional Registrar, High Court, Madras on1 1.2.2002 and obtained a challan on the same day from the Accounts Section an thereafter I remitted the money in the Reserve Bank of India on 11.2.2002. If the steno copy has been furnished to my counsel there would not have been any occasion for my counsel to give a requisition to the Additional Registrar, High Court, Madras and obtain his permission for remittance in compliance of the decree passed by the Divisional Bench."

6. Learned single Judge, after hearing both sides, by order dated 24.3.2003 rejected Application No.5348 of 2002 by observing :-

"5. The above submission cannot be countenanced. It is not in dispute that the respondent has made an application for steno copy on 26.06.2001 but it is his definite case that the said copy was not given to the respondent or to his counsel. As contemplated under Order 31 Rule 2 and 3 of the O.S. Rules even before getting any copy of the judgment, the respondent deposited the amount on 11.02.2002 after getting certificate from the Registrar. When such amount was deposited, the petitioner's application for certified copy was pending, as it was made on 26.11.2001 but copy was made available only on 19.02.2002. No material is available before this Court to reject the case of the respondent though he made an application for steno copy on 26.06.2001 and the only was served on with them.

6. In the absence of any such material, I have to accept that the amount deposited on 11.02.2002 is well within the time and in compliance of the judgment of the Division Bench made in O.S.A.No.89 of 1994. When the respondent had complied with the said condition within the stipulated time, the Application No.5348 of 2002 cannot be sustained. Hence, the application is rejected."

7. Fourth defendant, namely C.S. Selvaraj, filed Review Application No.1534 of 2003 to review the order dated 24.3.2003 in Appln.No.5348 of 2002 arising out of C.S.No.243 of 1980, wherein it was indicated :-

"5. I humbly submit that at the time of arguments in the above application, the Respondent herein has filed an affidavit at the last minute saying that even though he has made application for steno copy on 26.6.2001 on 28.11.2001 and on the very same day the very same counsel for Respondent/Plaintiff has

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also received another steno copy of the order in C.D.No.44701 in respect of another case.

5. As directed by this Hon'ble Court, the Respondent / Plaintiff filed an affidavit at the last minute, admitting the fact that his Advocate Clerk has applied for steno copy of the order in C.D.No.44701 dated 26.6.2001 but he has not received the copy which is false. In fact at the time of submissions on 24.3.2003, it was by this Hon'ble Court that if the affidavit filed by the Respondent is found to be not true, they will be punished for guilty of contempt.

6. I humbly submit now that on deliberate false affidavit has been filed by the Respondent/Plaintiff, I am filing this affidavit for reviewing the order. There is an error apparent on the face of the record."

8. A counter affidavit was filed on behalf of the present appellant, wherein it was indicated :-

"5. The fact that steno copy application was filed on my behalf in O.S.A.No.89/1994 is not in dispute and the same has not been received by my counsel or erstwhile clerk or present clerk or by my counsel himself till date after the same was made ready. On verification of the copy application Register it would indicate that a court fee of Rs.5/- has been paid in C.D.No.44701 and it appears that some one has signed in the register but was subsequently scored off the signature appearing as against my counsel's name. If I had really received the Steno copy of the order, as suggested by the applicant, there would not have been any need or necessity for me at to my counsel to approach the Additional Registrar, High Court, Madras on 11.2.2002 with a requisition letter for issuance of Challan for remittance of money into Reserve Bank of India as per the directions of the Division Bench."

In para 6 of the counter it was stated that the sale deed had already been executed by the Assistant Registrar and Execution Petition No.51 of 2002 was filed for delivery of vacant possession. It was further stated that there was no error apparent on the face of the record warranting review of the order.

9. Ultimately, by order dated 15.7.2003, the learned single Judge reviewed the earlier order and held that the applicant is entitled to rescind the contract as envisaged under Section 28(1) of the Specific Relief Act, 1963. The main conclusion of the learned single Judge is to the following effect :-

"8. From the records maintained by the Registry, it is clear that steno copy of the judgment in O.S.A.No.89/1994 in Application No.44701 was made ready on2 7.11.2001. From the register, I am able to see that the order copy was received. The presumption is that it should have been received by the Advocate

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who applied for the same. When the application made by the counsel for the respondent through his clerk is admitted, it cannot be said that it should have been received by somebody. It is not the case of the respondent also. But, unfortunately, when this issue is raised and the same is pending for decision, the signature acknowledging the receipt of the judgment has been manipulated by scrapping the same."

10. The present appeal is filed by the plaintiff against the said order of the learned single Judge passed in the Review Application.

11. Learned Senior Counsel appearing for the appellant has contended that the learned single Judge has reviewed the earlier order without keeping in view the limited scope of interference in a Review. It is also contended that even assuming that there was delay of 19 days in making the deposit, the learned single Judge has not considered the question as to whether such delay could have been condoned and the amount could have been accepted. Learned Senior Counsel appearing for the appellant further submitted that in fact the appeal filed by the defendants had been dismissed and while confirming the decree for specific performance the Division Bench had directed the plaintiff to pay a further sum of Rs.1,00,000/- and it was never indicated in the judgment that decree for specific performance had been modified nor it was indicated that execution of the decree was conditional upon payment of some amount. Learned Senior Counsel further submitted that in fact the sale deed had already been executed and the prayer was only for delivery of possession and the direction regarding payment of Rs.1,00,000/-, even if complied with belatedly, cannot have the effect of superseding the decree for specific performance of the contract.

12. Learned Senior Counsel appearing for defendants/respondents has submitted that since in a suit for specific performance of the contract the plaintiff is required to come with clean hands and as the plaintiff had suppressed the fact that steno copy of judgment of the Division Bench had been received, equitable/discretionary relief should not be extended. Learned Senior counsel has placed reliance upon the decision of the Supreme Court reported in (1994) 1 SCC 1 (S.P. CHENGALVARAYA NAIDU (DEAD) BY LRS. v. JAGANNATH (DEAD) BY LRS. AND OTHERS) in support of his contention that action of the plaintiff/appellant amounted to fraud on the Court and therefore the learned single Judge was justified in reviewing the earlier order.

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13. The scope of Review is a well settled proposition of law as apparent from several decisions of the Supreme Court as well as of this Court. In AIR 2006 SC 2686 (JAIN STUDIOS LTD. THROUGH ITS PRESIDENT v. SHIN SATELLITE PUBLIC CO. LTD.), it was observed :-

"11. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief

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which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior Court to correct all errors committed by a subordinate Court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases."

14. Even though the observations made in AIR 1979 SC 1047 (ARIBAM TULESHWAR SHARMA v. ARIBAM PISHAK SHARMA) was in the context of review of decision of the High Court rendered under Article 226 of the Constitution, ratio of the decision can be made applicable to review of any decision. The following observations are worth quoting:-

"3. ... But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

The aforesaid decision was followed in AIR 1995 SC 455 (MEERA BHANJA v. NIRMALA KUMARI CHOUDHURY).

15. The scope of review is obviously circumscribed by the provisions contained in Section 114 of and Order 47 Rule 1 of C.P.C. There is material on record to indicate that the fact that there was some endorsement in the Register relating to service of steno copy was within the knowledge of the respondent / 4th defendant, who was seeking review of the earlier order of the learned single Judge. As a matter of fact, from the materials on record, it is apparent that even when objection had been filed in the execution case and thereafter application was filed purporting to be under Section 28 of the Specific Relief Act, the defendant was very much aware of the copy application made on behalf of the plaintiff. In the affidavit filed by the defendant in Appln.Nos.5348 & 5349 of 2002 in February 2003, the respondent / defendant had specifically mentioned about the steno copy Application No.44701/01 in O.S.A.No.89 of 12994, filed by the plaintiff. Therefore, when the matter was being taken up, the respondent/defendant could have and should have taken steps to obtain necessary materials in support of his contention.

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There is not even discussion by the learned single Judge that basis of the Review was alleged discovery of any new material not within the knowledge of the parties. Keeping in view the limited scope of review, even assuming that earlier order of the learned single Judge was erroneous, we do not find any justification for invoking the Review jurisdiction. Since the parameters of the Review were not applicable, we feel that the learned single Judge has committed illegality in reviewing the earlier order. Discussion in the earlier order clearly indicates that the question subsequently raised was very much in contention and it was for the party seeking rescission of contract under Section 28 of the Specific Relief Act to establish his case by adducing sufficient material. The specious plea taken in the Review Application that an affidavit was filed belatedly by the plaintiff and on that basis the learned single Judge had passed the order rejecting the application on an earlier occasion does not appear to be correct as the reply affidavit of the present appellant was filed on 20.3.2003 an the learned single Judge had dealt with the matter on 24.3.2003.

16. Even otherwise, we feel that in the peculiar facts and circumstances of the case, delay of 19 days by calculating the period from 28.11.2001 in making the deposit should have been condoned.

It is well settled that in a suit for specific performance of the contract, the Court retains jurisdiction to extend time. (See 2007(3) CTC 773 (CHANDA (DEAD) THROUGH LRS. v. RATTNI AND ANOTHER).

17. In the present case, the entire purchase money had been paid, but the Court even while dismissing the appeal filed by the defendant had ordered payment of additional amount. Moreover, from the judgment of the Division Bench it is apparent that the Division Bench had dismissed the appeal and confirmed the decree relating to specific performance of the contract. Of course while dismissing the appeal, the Division Bench had also given a direction for payment of Rs.1,00,000/-, but no condition was specifically imposed that on failure to make such deposit, the judgment and decree would become inoperative. It is also to be noticed that in fact the sale deed had already been executed and, therefore, to that extent it can be said that nothing remained in the contract to be fulfilled and, therefore, at that stage, there was no question of rescinding the contract. In the peculiar facts and circumstances of the case, we do not think the ratio of the decision in (1994) 1 SCC 1 (supra) cited by the Senior Counsel for the defendants can be made applicable to the present case.

18. We would have also considered the question of payment of further amount by the decree-holder for the so called period of delay, but we feel that no such direction is required to be given, particularly when we find that the defendants themselves had not complied with the direction of the Division Bench regarding payment of Rs.2,000/- per month, which was

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apparently a condition for grant of stay of dispossession.

19. For the aforesaid reasons, we are unable to uphold the order passed by the learned single Judge in Review No.1534 of 2003 and therefore the appeal is allowed and the earlier order dismissing Application No.5348 of 2002 is confirmed. There would be no order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

dpk

To

1. The Sub-Asst. Registrar, Original Side, High Court,Madras

2. The Record-Keeper, V.R. Section, High Court, Madras

+ 1 CC To Mr. P.Valliappan, Advocate SR NO.50480

+ 2 CCs To Mr.M A.Srinivasan, Advocate SR NO.50394

+ 1 CC To Ms.G.V.Shoba, Advocate SR NO.50395

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